

CHAPTER 2. ENVIRONMENTAL REGULATIONS AND PERMITS

This chapter describes specific regulatory processes that may apply to individual CALFED actions or groups of actions, the requirements for each, and recommendations for facilitating compliance. The chapter is divided into the following major sections:

- “National Environmental Policy Act and California Environmental Quality Act”;
- “Federal Endangered Species Act, California Endangered Species Act, and Natural Community Conservation Planning Act”;
- “Other Federal Laws and Regulations”;
- “Other State Laws and Regulations”;
- “Local Regulatory Compliance”; and
- “Compliance with Hazardous Material Laws and Regulations”.

The project proponents for most actions implementing the CALFED Preferred Program Alternative presumably will be federal, State, and local agencies, which will be required to obtain the environmental clearances outlined in these recommendations. However, some of the actions may be implemented by nonpublic entities. Nonpublic entities may implement some CALFED actions under the direction of a public agency. For these entities, the requirements to comply with State and federal environmental laws and regulations may be defined differently by each public agency. Applicants in this situation should consult CALFED or the appropriate public agency for guidance.

The applicability of some State laws to federal agencies is not clear. While some federal agencies claim exemption from State laws, others comply voluntarily. However, federal laws administered by the State (such as Clean Water Act Section 401 and the Coastal Zone Management Act) do apply to all federal agencies.

NATIONAL ENVIRONMENTAL POLICY ACT AND CALIFORNIA ENVIRONMENTAL QUALITY ACT

NATIONAL ENVIRONMENTAL POLICY ACT

OVERVIEW

NEPA, signed into law in 1970, is the country's basic national charter for protection of the environment. It establishes policy, sets goals, and provides means for carrying out the policy. NEPA is a process (not a permit) that requires federal agencies to evaluate and disclose the environmental effects of their proposed actions. This requirement allows the public to review these effects and helps agencies assess the alternatives to and consequences of proposed actions.

The stated purposes of NEPA are to:

- declare a national policy that will encourage productive and enjoyable harmony between people and the environment,
- promote efforts that will prevent or eliminate damage to the environment and biosphere and stimulate health and welfare,
- enrich the understanding of the ecological system and natural resources important to the nation, and
- establish a [Council on Environmental Quality \(CEQ\)](#).

Depending on the potential impacts of a proposed project, the environmental information for compliance with NEPA is presented in one of three documents: a categorical exclusion or other exemption, an environmental assessment (EA) supporting a finding of no significant impact (FONSI), or an environmental impact statement (EIS). The most important steps in the NEPA process are shown in [Figure 1](#).

ADMINISTRATION AND OVERSIGHT

The CEQ was created to develop environmental policy and oversee federal agencies' implementation of NEPA. The CEQ is responsible for:

- issuing regulations and other guidance regarding NEPA,
- resolving lead agency disputes,
- mediating interagency disputes over environmental policy, and
- training and advising federal agencies on NEPA compliance.

WHO NEEDS TO COMPLY?

NEPA requires that a federal agency assess the effects of a proposed action on the human environment. This requirement applies to actions that the federal agency would:

- undertake directly,
- approve by issuing a permit or other authorization, or
- fund wholly or in part.

State or private actions may therefore be considered federal agency actions under NEPA if they are funded, financed, aided, controlled, permitted, licensed, enabled, caused, or approved by the federal government.

It is likely that most CALFED actions will be considered federal agency proposals that must comply with NEPA. CALFED actions will not require NEPA compliance if they are undertaken by a nonfederal project proponent and no federal agency issues a permit or entitlement or funds any portion of the project. As discussed below, environmental analysis under CEQA may be required for actions not subject to NEPA.

HOW LONG DOES THE APPROVAL PROCESS TAKE?

The CEQ NEPA regulations do not prescribe universal time limits for completing NEPA review; each federal agency is encouraged to set time limits for completing the entire NEPA process. The CEQ NEPA regulations do contain certain interim time periods, such as minimum requirements for public notice and review, that must be factored into any overall time limits that an agency adopts. Additionally, an agency must set time limits if an applicant for a proposed action requests them. The following are typical time frames for completing NEPA processes:

- EA, 3–6 months, and
- EIS, 9 months–several years.

If an EIS is addressing large and complex issues, however, the NEPA process may take up to 3–5 years.

WHAT DOES THE NEPA PROCESS ENTAIL?

Most federal agencies have prepared guidelines that provide more detail than the CEQ NEPA regulations about agency compliance with NEPA. The lead federal agency should consult its guidelines before it undertakes NEPA compliance. The following is an overview of the steps involved in NEPA compliance.

LEAD AND COOPERATING AGENCIES. First, the lead and cooperating agencies must be determined. The lead agency is the federal agency with primary responsibility for NEPA compliance. If more than one federal agency is involved, the lead agency is typically determined according to:

- magnitude of involvement,
- authority to approve or deny approval to the proposed action,
- expertise with regard to environmental effects, and
- duration and sequence of involvement.

Typically, only one federal agency is designated as the lead agency for NEPA compliance purposes. This agency is responsible for preparing the environmental documentation for the proposed action.

Other interested federal, State, and local agencies (including those with discretionary authority over some aspect of the proposed action), or Indian tribes, may be considered “cooperating” agencies. NEPA requires cooperating agencies with discretionary authority over the proposed action to be involved in preparing the NEPA document.

DETERMINING THE TYPE OF NEPA COMPLIANCE REQUIRED. Generally, there are three additional phases for implementation of NEPA. During the first phase, the lead agency must determine whether NEPA applies to the proposed action by deciding whether the action is “categorically excluded” or otherwise exempt from NEPA. If the action is not categorically excluded or exempt, the lead agency must determine during the next phase whether the proposed action may “significantly affect the quality of the human environment”. This generally involves preparing an EA to determine whether the proposed action would result in any significant environmental effects. However, an agency may bypass the preparation of an EA for certain projects that normally require an EIS.

During the third phase of the NEPA process, the federal agency prepares either a FONSI or an EIS. A FONSI is prepared if the agency determines that no significant effects would occur as a result of the proposed action; an EIS is prepared if the agency determines that the proposed action may have significant effects on the quality of the human environment. The NEPA compliance document may be prepared by lead agency staff members or by a contractor (consultant selected by the lead agency). A cooperating agency may also participate in the preparation of the document at the request of the lead agency. The lead agency, however, is ultimately responsible for the scope, contents, and legal adequacy of the document. The following discussions provide additional details about these documents.

CATEGORICAL EXCLUSION. For many actions, federal lead agencies can comply with NEPA by using a categorical exclusion. Categorical exclusions are classes of actions that have been determined by a federal agency within its specific NEPA regulations not to have significant individual or cumulative effects on the human environment. At the outset of project planning, the NEPA lead agency should determine whether an action falls within its list of categorical exclusions (sometimes known as “CEs”, “CXs”, or “CATEXs”).

If the action qualifies for a categorical exclusion, the lead agency is not required to prepare a detailed environmental review (an EA and either a FONSI or an EIS) for NEPA compliance. The lead agency should consider preparing written documentation that discusses the appropriateness of the particular categorical exclusion and the reasons that exceptions are not involved.

Types of projects that typically receive categorical exclusions include:

- research, inventory, and information collection activities;
- renovations and replacements of existing facilities;
- construction of small structures or improvements; and
- consultation and technical assistance.

Exceptions (sometimes referred to as “extraordinary circumstances”) can sometimes preclude the use of a categorical exclusion. If the action triggers one of these exceptions, the categorical exclusion does not apply and the lead agency may be required to prepare an EA and a FONSI or EIS. Typical exceptions include projects that:

- may have adverse environmental effects on unique geographic characteristics, such as:
 - historical or cultural resources;
 - park, recreation, or refuge lands;
 - wilderness areas;
 - wild and scenic rivers;
 - sole or principal drinking water aquifers;
 - prime farmlands;
 - wetlands;
 - floodplains; or
 - ecologically significant or critical areas;
- have adverse effects on species listed or proposed for listing as threatened or endangered under the federal Endangered Species Act (FESA), or that have an adverse effect on designated critical habitat;
- establish a precedent for future action with potentially significant environmental effects; or
- may be directly related to other actions with individually insignificant but cumulatively significant environmental effects.

ENVIRONMENTAL ASSESSMENT. If a proposed action is subject to NEPA and no categorical exclusion is appropriate, the lead agency may prepare an EA to determine whether the specific action could cause significant environmental effects. An EA is a concise public document that a lead agency prepares when it does not know whether impacts would be significant. The EA analysis leads to the preparation of either a FONSI or an EIS (see below).

A lead agency may, however, bypass the preparation of an EA for certain types of proposed actions that it determines normally require an EIS.

The depth of and level of detail in the impact analysis of an EA normally should be limited to that needed by the lead agency to determine whether there would be significant environmental effects. The level of significance is based on the lead agency's judgment; scientific and factual data are used to determine whether there would be a substantial adverse change in the physical environment. Based on the results of the EA, the federal agency may determine whether it must prepare an EIS to implement the proposed action. If an EIS is not necessary, a FONSI should be prepared (see below).

MITIGATION. The lead agency should incorporate mitigation measures into the project description so that a proposed action's impacts are avoided or reduced substantially. If mitigation measures are added before the EA is issued to the public, a FONSI, or what is sometimes referred to as "mitigated FONSI", can be prepared instead of an EIS.

PUBLIC INVOLVEMENT/NOTICE OF AVAILABILITY. When preparing an EA, a federal agency must involve other federal environmental agencies, project applicants, and the public to the extent practicable. Because EAs are public environmental documents, agencies must provide notice of their availability. Each agency must follow its NEPA regulations in determining the specific public notice requirements for an EA. At a minimum, however, an agency must make the EA available to the public on request.

SCOPING. Scoping is not a requirement when an agency prepares an EA. However, scoping can be a useful tool for discovering alternatives to a proposal or significant environmental impacts that may have been overlooked.

Scoping is a public process designed to determine the scope of issues to be addressed in an EA or EIS. Scoping should occur as early as possible after a lead agency decides to prepare an EA/EIS. It should be an open process intended to obtain the views of other agencies and the public regarding the scope of the EA or EIS.

FINDING OF NO SIGNIFICANT IMPACT. If a specific action has no potential for significant environmental effects, the NEPA lead agency may prepare a FONSI. A "mitigated" FONSI is often prepared, although NEPA does not specifically authorize this type of document.

A FONSI is prepared to document that the proposed federal action would not have any substantial environmental effects. A mitigated FONSI is prepared when an EA indicates that environmental effects of a proposal are potentially significant but that, with mitigation, those effects will be reduced to less-than-significant levels. Such a FONSI incorporates mitigation into the proposed action.

The FONSI is not always distributed for public review unless the federal agency's NEPA regulations require distribution; in these instances, the public review period typically lasts 30 days.

ACTION APPROVAL; ENVIRONMENTAL COMMITMENTS; AND MONITORING. After the FONSI has been prepared and the distribution time period (optional) has elapsed, the federal

agency may approve the action. As part of the action approval, the agency may impose environmental conditions based on mitigation committed to in the EA. In addition, the agency may require the project proponent to prepare and implement a monitoring program to report on the completion and success of the environmental commitments.

ENVIRONMENTAL IMPACT STATEMENT. If a specific action is not categorically excluded or otherwise exempt from NEPA and could have a significant effect on the environment, and preparation of a FONSI is therefore not appropriate, an EIS must be prepared. The EIS preparation process consists of the following series of procedural steps to ensure that adequate analysis of environmental issues and public notification occurs.

NOTICE OF INTENT. The first formal step in preparing an EIS is publishing a notice of intent to prepare an EIS. As soon as is practical after the lead agency decides to prepare an EIS, but before the scoping process begins, the lead agency publishes a notice of intent in the Federal Register. The notice of intent describes the proposed action and alternatives, describes the proposed scoping process, and provides the name and address of a lead agency contact person.

SCOPING. Scoping should occur as early as possible after a lead agency decides to prepare an EIS. The lead agency should use scoping to obtain the views of other agencies and the public regarding the scope of the EIS. The objectives of scoping are to:

- invite other agencies to participate,
- determine scope and significant issues,
- identify and eliminate issues that are insignificant,
- allocate assignments among agencies,
- identify related environmental documents that are being prepared,
- identify other environmental review and consultation requirements,
- set page limits,
- set time limits, and
- adopt procedures to combine the environmental analysis with scoping.

DRAFT EIS. A draft EIS must be prepared in accordance with the scope decided on in the scoping process. The draft EIS must contain all the required contents specified in the CEQ NEPA regulations (see “What Information Does the Applicant Need to Provide?” below) and must disclose and discuss all major points of view on the environmental impacts of the alternatives. In the draft EIS, the lead agency makes sure to include information it has gained during scoping and during its consultation with federal, state, and local agencies that have jurisdiction or special expertise. The EIS must disclose and discuss the environmental impacts of the proposed action and a reasonable range of alternatives that meet the project purpose and need.

PUBLIC INVOLVEMENT AND NOTICE OF AVAILABILITY. The lead agency must make diligent efforts to involve the public in preparing an EIS. It must provide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents to inform interested persons and agencies. Once the draft EIS is prepared, the lead agency must

distribute the document for review by other agencies and the public. If the EIS is unusually long, the summary alone may be circulated. However, the lead agency must provide the entire draft EIS to federal agencies that have jurisdiction over or expertise on the proposed action, as well as to environmental regulatory agencies, the project applicant, and persons who request copies of the full EIS.

The lead agency must obtain comments from the federal, state, and local agencies with jurisdiction over or expertise on the proposed action. Comments should also be requested from the project applicant (if different from the lead agency), agencies that ask to be notified, Native American tribes, and the public. Generally, a lead agency must allow at least 45 days for comment on a draft EIS.

FINAL EIS. After the lead agency receives and reviews comments on the draft document, it prepares a final EIS. The final EIS must contain the lead agency's responses to all comments and discuss any opposing views on substantive issues raised. The final EIS may also include a re-publication of the draft EIS that incorporates any changes required by responses to comments on the draft EIS.

The final EIS is circulated to federal agencies with jurisdiction or expertise, to environmental regulatory agencies, and to the project applicant, as well as to persons who request notification or who submitted comments. The lead agency must file the final EIS with the U.S. Environmental Protection Agency's (EPA's) Office of Federal Activities. Each week, EPA must publish a notice in the Federal Register that lists the final EISs received during the preceding week. The 30-day waiting period is measured from the date of publication in the Federal Register. The lead agency need not reply to any comments received on the final EIS.

ADOPTING THE FINAL EIS AND PREPARING A RECORD OF DECISION. When the federal lead agency determines that the EIS meets NEPA requirements, it prepares the record of decision (ROD), a written public record that explains a particular course of action. The ROD must be made available to the public through appropriate public notice. There is no specific requirement for publication of the ROD in the Federal Register or elsewhere; however, some agencies do publish their RODs in the Federal Register.

ACTION APPROVAL; ENVIRONMENTAL COMMITMENTS; AND MONITORING. After the ROD has been finalized, the federal agency may approve the action. As part of the action approval, the agency may impose environmental conditions based on the mitigation presented in the EIS. In the ROD, the agency is required to adopt a monitoring and reporting program for all mitigation adopted and made a condition of approval. At this point the project proponent would be required to implement the monitoring and reporting program to report on the completion and success of the environmental commitments adopted as mitigation.

TIERED DOCUMENTS. Agencies are encouraged to tier environmental documents to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review. Whenever a broad EIS or EA on a program has been prepared and an EIS or EA is subsequently prepared on an action included within the program, the subsequent, or "second-tier", EIS or EA need only summarize the issues discussed

in the broader EIS or EA. The second-tier EIS or EA should incorporate discussions from the broader analysis by reference and should concentrate on the issues specific to the subsequent action.

The CALFED Bay-Delta Program Final Programmatic Environmental Impact Statement/Environmental Impact Report (PEIS/EIR) is a broad EIS from which subsequent NEPA documents can be tiered. Volume 1, Chapter 3, provides detailed guidance on tiering from the PEIS/EIR.

WHAT INFORMATION DOES THE APPLICANT NEED TO PROVIDE?

CATEGORICAL EXCLUSION. If a proposed action is described in an agency's list of categorical exclusions, neither an EA nor an EIS is required. Some agencies, however, do prepare an internal memorandum that documents the determination that a proposed action is categorically excluded from NEPA documentation.

ENVIRONMENTAL ASSESSMENT. NEPA requires that an EA:

- briefly discuss the need for the proposed action,
- offer alternatives to the proposed action,
- discuss the affected environment and the environmental effects of the proposed action and alternatives,
- list agencies and persons consulted in the preparation of the EA, and
- provide supporting technical data or appendices.

The EA must also consider cumulative impacts when determining whether an action significantly affects environmental quality. If it is reasonable to anticipate cumulatively significant impacts, an EIS must be prepared.

FINDING OF NO SIGNIFICANT IMPACT. The FONSI must:

- briefly present reasons why the specific action would not have a significant impact on the quality of the human environment (referring to, not duplicating, the information included in the EA);
- state that an EIS is not required;
- include references to related environmental documents;
- present all mitigation measures that have become part of the specific action; and
- include monitoring efforts to ensure implementation.

A copy of the EA that supports the finding should be attached to the FONSI.

ENVIRONMENTAL IMPACT STATEMENT. CEQ's NEPA regulations specify the following required contents and recommended format for an EIS:

- Cover sheet. Not exceeding one page, the cover sheet should include:
 - a list of the responsible agencies including the lead agency and any cooperating agencies;
 - the title of the proposed action that is the subject of the statement, together with the state and county where the action is located;
 - the name, address, and telephone number of the person at the agency who can supply further information;
 - a designation of the statement as a draft, final, or draft or final supplement;
 - a one-paragraph abstract of the statement; and
 - the date by which comments must be received.
- Summary. The summary should highlight the major conclusions, areas of controversy, and the issues to be resolved. The summary normally does not exceed 15 pages.
- Table of contents.
- Purpose of and need for action.
- Alternatives, including the proposed action. This section should:
 - explore and objectively evaluate all reasonable alternatives;
 - devote substantial treatment to each alternative considered in detail, including the proposed action, so that reviewers may evaluate their comparative merits;
 - include reasonable alternatives not within the jurisdiction of the lead agency;
 - include an alternative of no action;
 - identify the agency's preferred alternative(s); and
 - include appropriate mitigation measures not already included in the proposed action or alternatives.

- Affected environment. A succinct description of the affected environment should be discussed. The descriptions should be no longer than is necessary to provide context for the discussion of the effects of the alternatives.
- Environmental consequences. The environmental consequences section of an EIS forms the scientific and analytic basis for the comparison of alternatives. The discussion of environmental consequences should describe:
 - direct and indirect effects, and their significance;
 - possible conflicts between the proposed action and the objectives of federal, tribal, regional, state, and local land use plans and policies for the area concerned;
 - the environmental effects of alternatives including the proposed action; and
 - means to mitigate adverse environmental impacts.
- List of preparers.
- List of agencies, organizations, and persons to whom copies of the statement are sent.
- Index.
- Appendices (if any).

Additionally, a final EIS must include the lead agency's responses to comments on the draft EIS.

RECORD OF DECISION. The ROD must:

- include a statement explaining the decision;
- explain alternatives that were considered and those that are environmentally preferable;
- describe factors considered by the lead agency in making the decision;
- explain which mitigation measures, if any, were adopted, and if mitigation measures were not adopted, explain why not; and
- describe the monitoring and enforcement program for any adopted mitigation measures.

WHAT IS THE FEE?

NEPA allows lead agencies to collect fees from project applicants for NEPA implementation. Each lead agency's fee for NEPA compliance will depend on the complexity of the project, the controversy surrounding the project, the resources affected, and the type of document necessary to achieve NEPA compliance.

DOES THIS PROCESS TRIGGER THE NEED FOR COMPLIANCE WITH OTHER REGULATIONS?

NEPA compliance is often triggered by applications for federal permits or other approvals; however, NEPA in itself does not trigger the need for compliance with other regulations.

Federal agencies must integrate compliance with NEPA and compliance with other environmental laws. Generally, proposed federal actions that trigger review under NEPA also require compliance with a variety of other federal and, often, state environmental laws. Each proposed federal action will trigger a different set of related environmental requirements depending on the type of activities being proposed. For example, if the action includes discharges into "waters of the United States", the applicant must also comply with Section 404 of the Clean Water Act. See Volume 1, Chapter 3, for guidance on integrating NEPA compliance and compliance with other environmental regulations.

WHAT ARE THE OPPORTUNITIES FOR FACILITATING COMPLIANCE WITH THIS PROCESS?

The following are recommended steps to simplify and streamline the NEPA process for CALFED actions:

- **Consult early.** Agencies should integrate the NEPA process with other planning processes as early as possible to avoid delays later in the process, and to head off potential conflicts.
- **Conduct a scoping meeting.** Although scoping meetings are not required under NEPA, CEQ recommends that lead agencies use them to obtain input from other agencies and the public on the scope and content of an EA or EIS. The timing of the scoping meeting should be early enough to openly discuss the proposal before the resources are committed but late enough so there is something to which people can react.
- **Tier from the CALFED PEIS/EIR.** The EA or EIS should incorporate by reference the relevant information contained in the PEIS/EIR, in other programmatic documentation, and in other NEPA documents (such as information contained in an EA or EIS prepared for other proposed actions). CALFED's "Guidance for Tiering from the CALFED Final Programmatic EIS/EIR". Volume 1, Chapter 3, provides specific guidance on tiering from the PEIS/EIR. Use of this guide is strongly recommended for projects that receive funding from CALFED.

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